3-24-1976

William C. Jacobs v. Lexington-Fayette Urban County Government and Ed Hahn, County Sheriff

Appellant's Brief 1976-SC-0086

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APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 76-86

WILLIAM C. JACOBS - - - Appellant

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT and ED HAHN, COUNTY SHERIFF - Appellees

APPEAL FROM FAYETTE CIRCUIT COURT
CIVIL BRANCH, THIRD DIVISION
HONORABLE ARMAND ANGELUCCI

BRIEF FOR APPELLANT, WILLIAM C. JACOBS

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This is to certify that copies of the within brief have been served on Hon. Jerry Anderson, 111 Cheapside, Lexington, Kentucky 40507; Hon. Donald D. Waggoner, Municipal Building, Lexington, Kentucky 40507; Hon. George Rabe, Municipal Building, Lexington, Kentucky 40507 and the Honorable Armand Angelucci, Judge, Civil Branch, Third Division, Fayette Circuit Court, Courthouse, Main Street, Lexington, Kentucky 40507, pursuant to RCA 1.250 on this the ____ day of March, 1976.

William C. Jacobs
Attorney for Appellant,
William C. Jacobs

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TABLE OF CONTENTS, POINTS AND AUTHORITIES

STATEMENT OF QUESTIONS PRESENTED

1. Where an urban county establishes 2 taxing districts and levies an ad valorem tax in 1 such district at a rate in excess of $.50 per $100.00 on all taxable property, real, personal and mixed, the tax levy is unconstitutional as violating the following sections of the Kentucky Constitution: Section 157 (with respect to maximum rates for tax districts); Section 171 (with respect to uniformity); and Section 172A (with respect to limiting differences in rate to the class of property which includes the surface of the land).

2. A contract for the collection of taxes is not valid, where neither of the parties to the contract is a person charged with the responsibility of collecting the tax.

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V.

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STATEMENT OF THE CASE

On November 21, 1974, the legislative body of Appellee, Lexington-Fayette Urban County Government, by ordinance levied an ad valorem tax in the "Full Urban Services" taxing district of Defendant, in excess of $.50 on the $100.00 of assessed valuation of "all assessed and assessable property, real, personal and mixed tangible and intangible of every kind and description." (R/A, p. 15). Six days later, Appellant instituted this action. The ad valorem tax levied by Defendant for the taxing district mentioned, was $.617 on each $100.00 of assessed valua-

tion of all property. Appellant contended that such ad valorem tax levy was and is unconstitutional as exceeding the constitutional ad valorem tax limit for taxing districts allowed by Section 157 of the Constitution of the Commonwealth of Kentucky.

In his Complaint, Appellant, also, challenged the agreement entered into between the Defendants, (R/A, p. 11, Exhibit A to Plaintiff's Complaint), as being illegal as devolving upon one not authorized to collect taxes under the Charter of the Defendant-Government, i.e., Ed Hahn, County Sheriff, the authority to collect taxes by a contract with another, the Mayor of the Defendant-Government, one not empowered or authorized to collect taxes for the Defendant-Government.

It was stipulated by the parties that the area of the subject taxing district is the smaller of the two taxing districts. (R/A pp. 34-43). If the Court will permit the appellant to indulge in imagery, it is suggested that the Court envision the General Services District as if it were a dinner plate, and the Full Urban Services District as if it were a saucer placed upon the plate. All taxable property situated within the perimeter of the saucer is subject to both the General Services District tax rate ($.1465) and the Full Urban Services District tax rate ($.617). All taxable property situated outside the perimeter of the saucer, but within the perimeter of the dinner plate is subject only to the General Services District tax rate ($.1465). It is therefore a fact that taxes levied by the Defendant within the territorial limits of the authority levying the tax are not uniform upon all property of the same class subject to taxation.

Section 172A of the Kentucky Constitution permits the General Assembly to provide for reasonable differences in ad valorem rates within different areas of the *same* taxing district on that class of property which includes the surface of the land. It was and is contended by Appellant that Ordinance No. 221-74 of the Defendant-Government is unconstitutional as:

(1) exceeding the constitutional limit of the $.50 per $100.00 of Section 157 of the Constitution for the taxing district known as the Full Urban Services District, and

(2) the ordinance does not escape the requirement of uniformity of tax rates upon all property in the same class subject to taxation within the territorial limits of the Defendant-Government as required by Section 171 of the Constitution in that Section 172A of the Kentucky Constitution permits reasonable differences in the rate of ad valorem taxation only (a) within different areas of the same taxing district, and (b) on that class of property which includes the surface of the land.

The taxes levied within the territorial limits of the Defendant-Government are not uniform upon all property subject to taxation. The subject ordinance (No. 221-74) makes no distinction between the tax rates within the "same taxing district" in that the rate differences exist only with respect to the rate as between each taxing district. The ad valorem tax is levied on all property without limiting the rate to the class of property which includes the surface of the land. The tax rate for the Full Urban Services taxing district exceeds $.50 on the $100.00. There-

fore, such ordinance constitutes an illegal and unconstitutional levy of an ad valorem tax.

The trial court found in its opinion (R/A, p. 76) that the Appellant had standing to attack the validity of the contract between Defendants and that injunction was an appropriate remedy available to Appellant if the alleged tax was illegal. The trial court held, however, that the contract between the Defendants with respect to tax collection was authorized under the Charter and that the rate of taxation in the subject taxing district in excess of $.50 per $100.00 valuation did not violate Section 157 of the Kentucky Constitution. From such adverse ruling Appellant timely perfected his appeal.

ARGUMENT

I.

WHERE AN URBAN COUNTY ESTABLISHES 2 TAXING DISTRICTS AND LEVIES AN AD VALOREM TAX IN 1 SUCH DISTRICT AT A RATE IN EXCESS OF $.50 PER $100.00 ON ALL TAXABLE PROPERTY, REAL, PERSONAL AND MIXED, THE TAX LEVY IS UNCONSTITUTIONAL AS VIOLATING THE FOLLOWING SECTIONS OF THE KENTUCKY CONSTITUTION: SECTION 157 (WITH RESPECT TO MAXIMUM RATES FOR TAX DISTRICTS); SECTION 171 (WITH RESPECT TO UNIFORMITY); AND SECTION 172A (WITH RESPECT TO LIMITING DIFFERENCES IN RATE TO THE CLASS OF PROPERTY WHICH INCLUDES THE SURFACE OF THE LAND).

It was stipulated by the parties that the territorial limits of the Defendant-Government are divided into two distinct taxing districts and that the tax rate in one such district exceeds $.50 on the $100.00. On its face, then, the levying ordinance

violates Section 157 of the Kentucky Constitution which limits the tax rate for taxing districts to $.50 on the $100.00. Since two different and distinct tax rates are levied within the territorial limits of the authority levying the tax, on its face then, the levying ordinance violates Section 171 of the Kentucky Constitution requiring uniformity.

The trial court, however, in upholding the levy of a rate in excess of the $.50 and the lack of uniformity of rates relied on *Holsclaw v. Stephens*, Ky., 507 SW2d 462. When Holsclaw was decided, this Court was merely upholding the "Charter" of the Defendant-Government, and did not have before it any issue as to the manner in which the Defendant-Government implemented the provisions of that Charter. In fact, the government did not come into existence until after the original opinion in Holsclaw was rendered. In Holsclaw, at page 476, this Court specifically setout the manner in which the Defendant-Government could levy different rates within its territorial limits without running afoul of the Kentucky Constitution. That holding is quoted as follows:

> "We hold that Section 172A of the Constitution expressly authorizes the General Assembly to provide for reasonable differences in the rate of ad valorem taxation within different areas of the same taxing district on that class of property which includes the surface of the land. Those differences shall relate directly to differences between nonrevenue-producing governmental services and benefits giving land urban character which are furnished in one or several areas in contrast to other areas of the taxing dis-

> trict. KRS 82.085 expressly authorizes cities of the second class to levy ad valorem taxes at a different rate pursuant to that section of the Constitution. Since urban county government in Fayette County possesses all statutory powers granted to second-class cities it has authority to levy ad valorem taxes at different rates depending upon governmental services rendered."

The Defendant-Government ignored virtually every guideline prescribed by this Court in specifying the manner in which the Defendant-Government could levy different tax rates within its territorial limit in a constitutional manner. First, the levying ordinance subjected all property, not merely "that class of property which includes the surface of the land" to different rates of taxation within the territorial limits of the Defendant-Government. Second, the ordinance does not provide for reasonable differences in the ad valorem tax rate "within different areas of the same taxing district." Third, the difference in the tax rates exist with respect to two separate taxing districts rather than different areas of the "same" taxing district. Fourth, the ordinance is silent as to whether differences relate directly to differences between non-revenue producing governmental services and benefits giving land urban character which are furnished in one or several areas in contrast to other areas of the taxing district.

This Court in Holsclaw at page 481, forewarned the Defendant-Government of the practical problem it faced under Section 157 of the Constitution which provides that cities and towns *alone* may levy taxes at a rate in excess of $.50 per $100.00. This Court

pointed out that taxing districts, under that Section, are not permitted to exceed the $.50 rate. The majority opinion, apparently, did not adopt the view of Justice Reed in his concurring opinion to Holsclaw and, it is submitted, properly so. The majority opinion repeatedly held that an urban county is not a city, and it consistently held as inapplicable to urban counties general laws which effect a *limitation* or *restriction* on cities and counties. The Court exempted urban counties from:

a) The operation of statutes *regulating* fiscal courts (at page 474);

b) The *limitations* imposed by Section 160 of the Kentucky Constitution concerning the election of legislative bodies of cities (at page 476);

c) The *limitations* of Section 160 of the Kentucky Constitution on the terms of office of the Mayor (at page 477);

d) The duties and functions of the Budget Commission as *limited* by existing statutes (at page 477);

e) The statutes *regulating* merit and Civil Service Systems of cities (at pages 477-479);

f) The statutes *regulating* Police and Firemen's Pension Funds Boards and Civil Service Commissions of cities (at page 479).

Kentucky Constitution Section 157 *limits* the tax rate of cities, towns, counties, taxing districts and other municipalities, for other than school purposes. (Kentucky Constitution §181 *grants* the power.)

It would follow from the holding of Holsclaw that if any general law (constitutional or statutory) acts as a *limitation* on cities it would not be appli-

cable to urban counties. Thus, the ad valorem tax rate *limits* setout in Section 157 of the Kentucky Constitution as they apply to cities (second class cities for our purposes) are irrelevant in determining whether a tax levy of an urban county is valid.

Therefore, if an urban county undertook to levy one tax rate on all property situated within its territorial limits there would be no constitutional maximum since our Constitution makes no mention of urban counties. Since this Court has already held that an urban county is not a city, the only method whereby a constitutional tax rate limit could come into existence is by a judicial fiat that an urban county is a taxing district. To allow an urban county to drift in an "extra-constitutional" existence would leave tax rate limits and debt limits of urban counties to the whim of the General Assembly.

The General Assembly, in 1974, enacted KRS 67A.850, which provides in part:

> "Urban county government may: Exercise ad valorem property taxing powers pursuant to the Kentucky constitution, section 157, to the limits authorized therein for the class of city to which the largest city in the county belonged on the day prior to the date the urban-county government became effective. The taxing powers must be exercised by the urban-county government consistent with the Kentucky constitution, section 172A. . . ."

Can it be said that KRS 67A.850 empowers the Defendant-Government to create two separate taxing districts, with a tax rate in excess of $.50 per $100.00 valuation in one such taxing district, where the tax is levied on all taxable property, real, personal and mixed?

The tax rates for the two taxing districts established within the territorial limits of the Defendant-Government are not uniform in that the tax rate for the 1974-75 fiscal year for the General Services District is $.1465 on the $100.00 and the tax rate for the Full Urban Services District is $.617 on the $100.00. Kentucky Constitution Section 171 provides, in part:

> "Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax. . . ."

For cases requiring that the same rate be levied on all property subject to a tax within the territorial limits of the taxing authority see *Cummins vs. Ryan's Executors,* Ky., 104 SW 727; *Eminence Distillery Co. vs. Henry County Board of Supervisors,* Ky., 200 SW 347; *Lang vs. Commonwealth,* Ky., 226 SW 379; *Duncan Coal Co. vs. Board of Trustees,* Ky., 260 SW 341; *Board of Councilmen vs. Scott,* Ky., 42 SW 104; *Latonia vs. Hopkins,* Ky., 47 SW 248.

KRS 67A.850, quoted above, implies that urban counties may vary tax rates within their territorial limits if done in accordance with Section 172A of the Constitution. The lack of conformity of the levying ordinance with Section 172A of the Kentucky Constitution is blatant. In order to give KRS 67.850 a constitutional interpretation, it must be construed as a mere *limitation* on an urban county's power to tax and not a grant of power to ignore other constitutional provisions, e.g., Section 171 pertaining to uniformity and Section 157 pertaining to maximum rates permitted for taxing districts.

In view of the fact that the Charter identifies the Full Urban Services District as a taxing district, that the parties stipulated that it was a taxing district, that the tax rate was levied on all property, real, personal and mixed and in view of the fact that the tax rates are not uniform within the territorial limits of the taxing authority, the levy of a tax rate in excess of the $.50 on the $100.00 in the Full Urban Services District violates Section 157 of the Kentucky Constitution.

The trial court gave three reasons for upholding the levy of the tax at a rate in excess of $.50 for the Full Urban Services taxing district. It is submitted that the trial court erred with respect to each. It found first, that the difference in tax rates within the territorial limits of the Defendant-Government could have been due to "the different valuation" of the property which includes the surface of the land, (R/A, p. 81), second, that Section 157 of the Kentucky Constitution is a provision which *confers* general powers of taxation rather than one that is a limitation on the taxing power and third, on broad policy grounds to the effect that if the holding were otherwise, it would defeat the concept of urban county government, which "is to provide a governmental unit better able to govern efficiently than the past city and county units" (R/A, p. 82).

To hold that the difference in tax rates could have been due to "the different valuation of the property which includes the surface of the land" confuses a "levy of a rate of taxation" with "valuation assessments." The former is the responsibility of the legislative body of the Defendant-Government and the latter the responsibility of the Property

Valuation Administrator. (See Charter Section 11.06). The Court may not assume that the Property Valuation Administrator violated the mandate of Section 172 of the Kentucky Constitution, which requires all property to be assessed for taxation at its "fair cash value." In this the trial court erred.

It was also error for the trial court to treat Section 157 of the Kentucky Constitution as a provision which confers a general power of taxation. Such a holding is contrary to Holsclaw (at page 481), wherein this Court decided this very question.

It was also error for the trial court to uphold the levy in the Full Urban Services taxing district in excess of $.50, as if a contrary holding would defeat the urban county concept. The tax rate for the General Services taxing district (the entire territorial limits of the Defendant-Government) was only $.1465 on the $100.00. Thus, a considerable margin of tax rate increase is available for the General Services taxing district between $.1465 and $.50, the maximum allowable for a taxing district.

For these reasons, the trial court ought to have found the tax rate for the Full Urban Services taxing district exceeded the constitutional limit of Section 157 and ought to have granted Appellant the injunctive relief sought.

II.

A CONTRACT FOR THE COLLECTION OF TAXES IS NOT VALID, WHERE NEITHER OF THE PARTIES TO THE CONTRACT IS A PERSON CHARGED WITH THE RESPONSIBILITY OF COLLECTING THE TAX.

Section 6.06 of the "Charter of Lexington-Fayette Urban County Government" provides in part at grammatical paragraph 5 as follows:

> "The Division of Tax Collection shall be charged with the collection of all income, revenues and monies due the Merged Government. The County Sheriff, elected under the Constitution and laws of Kentucky shall continue to collect all taxes levied by the Merged Government which are to be collected under law by County Sheriffs. All taxes collected by the Sheriff shall be filed with the Director of the Division of Tax Collection. The Director of the Division of Tax Collection shall be responsible for collecting all taxes levied by the Merged Government not covered by the law pertaining to the tax collection duties of the County Sheriff."

Section 6.03 of the Charter provides, in part, as follows:

> "Each division within the Office of Administrative Services and the various Executive Departments shall be headed by a Division Director. Except as otherwise provided, all Division Directors shall be under the classified civil service system of the Merged Government."

The taxes sought to be collected under the agreement between the Defendant-Government and the Defendant-Sheriff (R/A, p. 11, Exhibit "A" to Plaintiff's Complaint) and particularly the ad valorem taxes for the taxing district known as the Full Urban Services District are not taxes which are to be collected under law by county sheriffs [the contract makes an assumption that the ad valorem taxes in the General Services District ("old county" outside the "old city") are taxes which the Sheriff is required by law to collect. That assumption ap-

parently is based on the erroneous theory that the Sheriff would be collecting *county* taxes.]

Under the Charter, a Civil Service employee, i.e., the Director of the Division of Tax Collection, is charged with the collection of the taxes levied by the Merged Government upon property within the Full Urban Services District.

It has been held that if the office of tax collector is under Civil Service, a person may be appointed to such office only in accordance with the applicable statutory provisions. *Alen vs. Corbett,* Ca., 77 P.2d 261.

It has been held that sheriffs are not, because of their office, collectors of delinquent, *or any taxes. Madison County vs. Hamilton,* Ky., 47 SW2d 938 (1932). That case, also, held that since constitutional provisions do not give sheriffs, as such, the right to collect taxes, the Legislature is authorized to designate the collector. No statute of Kentucky designates the sheriff as tax collector for urban counties.

The office of the Director of the Division of Tax Collection was vacant on the date of the agreement. It has been held in Kentucky that a vacancy in the office must be filled according to statutory requirements. *Department of Revenue vs. McIlvain,* Ky., 195 SW2d 63 (1946); *Barkley vs. Stockdell,* Ky., 66 SW2d 43 (1933).

It is clear under Kentucky law applicable to incompatible offices that a county sheriff may not be a civil service employee of any local government. KRS 61.080(3) provides that "no person shall, at the same time fill a county office and a municipal office." The

Defendant-Sheriff obviously has not, and could not have validly undertaken the duties of the Director of the Division of Tax Collection in that he did not qualify, or attempt to qualify, under Civil Service. Had he done so, KRS 61.090 would have been applicable.

The only signatories to the agreement mentioned above are the Mayor of the Defendant-Government and the Defendant-County Sheriff. Since the Mayor is not the Officer of the Defendant-Government charged with the responsibility of collecting the taxes of such Merged Government, he is without authority to contract that responsibility away. Further, there is no statutory authority nor any authority in the Charter authorizing the governing body of the Defendant-Government to authorize a contract for the collection of the taxes levied by the Merged Government, the responsibility therefor being exclusively that of the Director of the Division of Tax Collection.

In upholding the contract, the trial court made three erroneous assumptions: 1) that the office of the Director of the Division of Tax Collection is below the division level; 2) that the legislature delegated the authority to determine the structure of the urban county government to the legislative body of the government, rather than the merger "commission" described in KRS 67A.020; and 3) that the Charter provision (Section 6.06) which makes the Director of the Division of Tax Collection responsible for the collecting taxes, not within the responsibility of the county sheriff, does not require that the taxes be "personally" collected by the Director.

That the Director of a division of the Defendant-Government can be treated as an office "below" a

division level seems fallacious on its face. The office obviously is "at" the division level. The discretionary powers of the council of Section 6.01 of the Charter pertain to internal organization "below" the office of the Director.

The broad holding of the trial court that it is the legislative body of the Defendant-Government which has been delegated the authority to determine the "structure" of the government would render the council autonomous, the Charter meaningless and the work of the merger "commission" and the adoption of the Charter by the voters, a monumental waste of time.

To hold that the responsibility for collecting taxes lies with a specific officer of the government (the Director of the Division of Tax Collection) but to hold that such responsibility does not carry with it a duty to collect the taxes "personally" begs the question. Obviously, the Director is not required to go door to door to collect taxes. But, to put the responsibility for the collection in an officer of the government, as the Charter did, any arrangement for the collection of taxes must be participated in by the officer wherein the responsibility for collection lies.

The subject contract was entered into between the county sheriff (a party not responsible for collecting urban county taxes), and the Mayor (not a party responsible for the collection of urban-county taxes). The contract is a nullity as not being entered into by the Director or the acting Director of the Division of Tax Collection and as it provided for a commission of 1.3% of the total amount of the taxes

collected being paid to the sheriff, it constituted a betrayal of the spirit of the urban county concept, that is, economy.

CONCLUSION

The trial court permitted this action to be maintained as a class action. (R/A, pp. 17-20). In that the tax levied for the Full Urban Services taxing district is unconstitutional as being excessive and that the contract for its collection is a nullity, this Court ought to reverse the trial court and enjoin the collection of such illegal tax from the Appellant and all other taxpayers similarly situated.

Respectfully submitted,

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